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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. RONALD WAYNE TAYLOR, Defendant and Appellant.	D052948 (Super. Ct. No. MH100441)

APPEAL from a judgment of the Superior Court of San Diego County, Peter L. Gallagher, Judge. Affirmed.

Ronald Wayne Taylor appeals an order involuntarily recommitting him to an indeterminate term to the custody of the State of California Department of Mental Health (DMH or Department) after a jury found him to be a sexually violent predator (SVP) under the amended Sexually Violent Predators Act (Welf. & Inst. Code[1], § 6600 et seq. (SVPA or Act).) Taylor contends the order must be reversed because: (1) his

1 All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

recommitment was "based upon the [DMH's] illegal use of underground regulations in the evaluation and screening process," and alternatively, trial counsel provided ineffective assistance of counsel by failing to challenge the validity of the SVP petition; (2) the Act violates state and federal due process guarantees because it imposes an indeterminate term on SVPs and requires them to prove they no longer qualify as SVPs; (3) the Act violates his state and federal rights to equal protection; (4) and the Act is a criminal statute that violates state and federal constitutional prohibitions against ex post facto laws and double jeopardy.[2] We Affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On November 7, 2006, the People filed a petition seeking to recommit Taylor as an SVP for an indeterminate term, alleging he "was convicted of a sexually violent offense against two or more victims, and has a diagnosed mental disorder that makes him a danger to the health and safety of others in that it is likely he will engage in sexually violent predatory criminal behavior." The petition further alleged the following: he was convicted of forcible rape in 1989, served prison time for that offense and was released (Pen. Code, § 261, subd. (2)). He had serious prison priors, including two counts of rape.

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2 The constitutional challenges raised in this appeal are currently pending before the California Supreme Court in the following cases: *People v. McKee* (2008) 160 Cal.App.4th 1517, review granted July 9, 2008, S162823; *People v. Johnson* (2008) 162 Cal.App.4th 1263, review granted August 13, 2008, S164388, *People v. Riffey* (2008) 163 Cal.App.4th 474, review granted August 20, 2008, S164711; *People v. Boyle* (2008) 164 Cal.App.4th 1266, review granted October 1, 2008, S166167; and *People v. Garcia* (2008) 165 Cal.App.4th 1120, review granted October 16, 2008, S166682.

He has been re-imprisoned for ten years. In 2005, the court found he was an SVP and committed him to the [DMH] for two years.

DISCUSSION

I.

Taylor contends that the DMH determines who is an SVP under section 6601 based on a handbook of procedures not enacted under the Administrative Procedure Act (APA).[3] The Office of Administrative Law determined the handbook contains numerous underground regulations.[4] Taylor contends, "the district attorney lacked the authority to file a petition for commitment and, therefore, the trial court lacked the authority to conduct a probable cause hearing, a trial, or to commit [him]." He claims that he was

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3 Government Code section 11340.5, subdivision (a) states: "No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [Government Code section] 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter."

4 On August 15, 2008, the Office of Administrative Law issued a determination (OAL Determination No. 19) that the protocol used by the DMH for SVP evaluations — the "Clinical Evaluator Handbook and Standardized Assessment Protocol (2007)" — met the statutory definition of a regulation and, therefore, should have been adopted pursuant to the APA. As such, it was an "underground regulation" as defined in California Code of Regulations, title 1, section 250. The determination made it clear, however, that the ruling was concerned solely with whether the protocol satisfied the criteria for a regulation under Government Code section 11342.600. It made no assessment as to the protocol's "advisability" or "wisdom." Rather, the determination cautioned that the Office of Administrative Law "has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination." The determination can be accessed via the Office of Administrative Law website. (<http://www.oal.ca.gov/determinations2008.htm.>)

illegally recommitted and seeks reversal of the commitment order and his immediate release.

Under section 6601, subdivision (a)(1), "an individual who is in custody under the jurisdiction of the Department of Corrections and Rehabilitation, and who is either serving a determinate prison sentence or whose parole has been revoked," may be determined by the secretary of the department to be a potential SVP. An SVP is defined as "a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a)(1).) When a potential SVP is identified, "the secretary shall, at least six months prior to that individual's scheduled date for release from prison, refer the person for evaluation in accordance with this section." (§ 6601(a)(1).) When this occurs, the potential SVP is referred to two mental health evaluators, who must agree that the individual has a diagnosed mental disorder and is likely to engage in acts of sexual violence absent appropriate treatment in custody. (§ 6601, subds. (b), (d), & (i).) A " '[d]iagnosed mental disorder' includes a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others." (§ 6600, subd. (c).) "Once two mental health evaluators agree that the person has a diagnosed mental disorder, and once the [secretary] has filed a petition, and the superior court has found probable cause, the individual has the right to counsel and to a jury trial." (See *In re Smith* (2008) 42 Cal.4th 1251, 1257.)

After Taylor filed his appellate briefs, the Second District Court of Appeal, Division Five, decided the issue presented here. It disagreed with the defendant's central contention that the use of the protocol-based mental health evaluations at the preliminary phases of the commitment proceedings deprived the trial court of fundamental jurisdiction to order commitment following the jury trial. The court stated, " 'In general, the only act that may deprive a court of jurisdiction is the People's failure to file a petition for recommitment before the expiration of the prior commitment.' [Citations.] Moreover, even in cases involving the denial of fundamental rights in the analogous preliminary hearing stage of a criminal prosecution, it is well established that reviewing courts apply the harmless error standard set forth in *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529-530." (*People v. Castillo* (2009) 170 Cal.App.4th 1156, 1177.) The First District Court of Appeal, Division One also recently reached this same conclusion in *People v. Medina* (2009) 171 Cal.App.4th 805. We agree with this conclusion.

We have held the failure to obtain the evaluation of two mental health professionals, which is required by the closely related provision of section 6601, subdivisions (c) and (d), did not deprive a court of fundamental jurisdiction to nonetheless act on an SVP petition. (See *People v. Superior Court* (*Preciado*) (2001) 87 Cal.App.4th 1122, 1128-1130 (*Preciado*).) We concluded this defect "was not one going to the substantive validity of the complaint, but rather was merely in the nature of a plea in abatement, by which a defendant may argue that for collateral reasons a complaint should not proceed." (*Id*. at p. 1128.) For the same reason, we reject Taylor's contention that a defect in adoption of the department's evaluation handbook somehow prevented the

court from acting on respondent's petition. The requirement that the handbook meet the APA requirements is collateral to the merits of Taylor's petition.

Taylor does not challenge the sufficiency of evidence at the probable cause hearing or at trial — and the protocol played no role in his trial. The Office of Administrative Law determination is not binding on the courts, but it is entitled to deference. (*Grier v. Kizer* (1991) 219 Cal.App.3d, 422, 434-435, disapproved on other grounds by *Tidewater Marine Western, Inc., v. Bradshaw* (1996) 14 Cal.4th 557, 577.) Nonetheless, that determination did not suggest the DMH's protocol was deficient or unreliable as an instrument for assessing a person's status as a potential SVP. Instead, OAL Determination No. 19 stated the Office of Administrative Law "has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in" the SVPA. Taylor's speculation that APA compliance likely will result in a materially different protocol more favorable to him does not undermine the legitimacy of his commitment following a unanimous jury verdict. Apart from asserting the protocol's status as an "underground regulation," Taylor fails to explain how use of the protocol in the proceedings against him resulted in actual prejudice, either by depriving him of a fundamental right or a fair trial.

Taylor has not shown prejudice under *People v. Pompa-Ortiz, supra,* 27 Cal.3d 519; therefore, his ineffectiveness of counsel claim must fail under the standard set forth in *Strickland v. Washington* (1984) 466 U.S. 668, 687-698 [defendant must demonstrate prejudice in order to establish ineffective assistance of counsel].) "[A] court need not determine whether counsel's performance was deficient before examining the prejudice

suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Id*. at p. 697; *In re Fields* (1990) 51 Cal.3d 1063, 1079.)

II.

Taylor contends his indeterminate recommitment under the SVPA violates his Fourteenth Amendment right to due process and his right to due process under the California Constitution. He maintains that due process requires that the state carry the burden of proof in all commitment proceedings, including a proceeding to continue his detention as an SVP.

Prior to 2006, a person who was found to be an SVP was committed for a two-year term under the SVPA. At the end of that term, the People were required to file another petition seeking a determination that the person remained an SVP. If the People did not file a recommitment petition, the person would have to be released. (Former § 6604, as amended by Stats. 2000, ch. 420, § 3.) On filing of a recommitment petition, a new jury trial was conducted at which the People again had the burden to prove beyond a reasonable doubt that the person was currently an SVP. (Former §§ 6604, 6605, subds. (d), (e); *People v. Munoz* (2005) 129 Cal.App.4th 421, 429 ["[A]n SVP extension hearing is not a review hearing. . . . An SVP extension hearing is a new and independent proceeding at which . . . the [People] must prove the [committed person] meets the [SVP] criteria, including that he or she has a currently diagnosed mental disorder that renders the person dangerous"].)

In 2006, the SVPA was amended first by the Legislature and then, with the passage of Proposition 83, by the electorate. The amended SVPA provides that an individual who is determined to be an SVP must be "committed for an indeterminate term to the custody of the [DMH] for appropriate treatment and confinement in a secure facility." (§ 6604.) Once committed, the individual must have "a current examination of his or her mental condition made at least once every year." (§ 6605, subd. (a).) After the examination, the Department must file a report in the form of a declaration that addresses (1) "whether the committed person currently meets the definition of [an SVP]," and (2) "whether conditional release to a less restrictive alternative or an unconditional release is in the best interest of the person and conditions can be imposed that would adequately protect the community." (*Ibid*.) The Department is to file this report with the trial court that committed the person, and must serve the report on the prosecuting agency and the committed individual. The committed individual may retain, or the court may appoint, a qualified expert to examine him or her. (*Ibid*.)

If the Department concludes in the report that the committed individual no longer meets the requirements of the SVPA, or that conditional release is appropriate, the Department must authorize the committed individual to petition the trial court for release. (§ 6605, subd. (b).) Upon receipt of the petition for conditional release or unconditional discharge, the trial court is to set a probable cause hearing at which the court "can consider the petition and any accompanying documentation provided by the medical director, the prosecuting attorney or the committed person." (*Ibid*.) If the trial court determines that probable cause exists to believe the petition has merit, it must set a

hearing on the issue, at which time the committed individual is "entitled to the benefit of all constitutional protections that were afforded him or her at the initial commitment proceeding." (*Id*., subds. (c), (d).) Either side may demand a trial by jury and may retain experts to examine the committed individual. (*Id*., subd. (d).) If the Department has authorized the individual to petition for conditional release or unconditional discharge, the state bears the burden to prove beyond a reasonable doubt that the committed individual is still an SVP. (*Ibid*.)

The Department is required to seek judicial review of an individual's commitment not only at the time of the annual examination, but at any time that the Department "has reason to believe" a committed individual is no longer an SVP. (§ 6605, subd. (f).) Similarly, if the Department determines that the committed individual's "diagnosed mental disorder has so changed that the person is not likely to commit acts of predatory sexual violence while under supervision and treatment in the community," the Department must send a report recommending conditional release of the committed individual to the trial court, the county attorney, and the committed individual's attorney. (§ 6607, subd. (a).) The trial court is required to hold a hearing on the report once it is received. (*Id*., subd. (b).)

After the first year of commitment, a committed individual may petition the trial court for conditional release or unconditional discharge even without the "recommendation or concurrence" of the Department. (§ 6608, subds. (a), (c).) The committed individual is entitled to the assistance of counsel in preparing and filing the petition. The individual must serve the Department with the petition. (*Id*., subd . (a).)

After receiving such a petition, the trial court "shall endeavor whenever possible to review the petition and determine if it is based upon frivolous grounds and, if so, shall deny the petition without a hearing." (*Ibid*.)

If, after receiving a petition filed by an individual without the recommendation or concurrence of the Department, the trial court determines that a hearing is appropriate, the committed individual has the burden of proving by a preponderance of the evidence that the petition should be granted. (§ 6608, subd. (i).) If the trial court determines that the committed individual "would not be a danger to others due to his or her diagnosed mental disorder while under supervision and treatment in the community," the trial court must order that the individual be placed in a state-operated forensic conditional release program. (*Id*., subd. (d).) The court retains jurisdiction of the person throughout the course of the conditional release program and, at the end of one year, the court must hold a hearing to determine whether the individual should be unconditionally released from commitment. (*Ibid*.) If the trial court denies the petition, the committed individual must wait a year before petitioning the trial court again. (*Id*., subd. (h).) The trial court must deny any subsequent petition filed by that individual "unless it contains facts upon which a court could find that the condition of the committed person had so changed that a hearing was warranted." (*Id*., subd. (a).)

As a result of Proposition 83's amendment to section 6604 making an SVP's commitment term indeterminate, as opposed to a two-year term, an SVP now remains committed, either fully or in a conditional release setting, "until he successfully bears the burden of proving he is no longer an SVP or the [DMH] determines he no longer meets

the definition of an SVP." (*Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275, 1287.)

"[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." (*Addington v. Texas* (1979) 441 U.S. 418, 425 (*Addington*).) "Due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed." (*Foucha v. Louisiana* (1992) 504 U.S. 71, 79 (*Foucha*).)

For an initial civil commitment, due process requires that the state prove by clear and convincing evidence both that the person is mentally ill and that the commitment is required for his or her own welfare or for the protection of others. (*Kansas v. Hendrick*s (1997) 521 U.S. 346, 358; *Addington*, *supra*, at pp. 426 427, 432 433.) Once the person has been committed, due process permits the state to hold the person only as long as he or she is both mentally ill and dangerous, but no longer. (*Foucha*, *supra*, at pp. 71-78 [continuing to hold dangerous person who is no longer mentally ill violates due process]; *Jones v. United States* (1983) 463 U.S. 354, 368, 370 (*Jones*) ["acquittee is entitled to release when he has recovered his sanity or is no longer dangerous"].)

Taylor relies primarily on *Foucha*, *supra*, at p. 71 for his argument that sections 6605 and 6608 improperly place the burden on him to prove that he should be released, rather than placing the burden of proof on the state to prove that he is still an SVP. In *Foucha*, the United States Supreme Court considered the constitutionality of a Louisiana statute that provided for the indefinite involuntary commitment of individuals found not guilty by reason of insanity who were determined to be dangerous, but not mentally ill.

The trial court had determined that the defendant had a personality disorder that was not considered a mental illness or, for that matter, a treatable disorder. There was testimony that the defendant was not suffering from either a neurosis or psychosis, and the state was "not claim[ing] that Foucha is now mentally ill." (*Id.* at p. 75, 80.) The court found that "a law like Louisiana's, which permits the indefinite detention of insanity acquittees who are not mentally ill but who do not prove they would not be dangerous to others," violated the Due Process clause. (*Foucha*, *supra*, at p. 83.)

Foucha prohibits the continued confinement of insanity acquittees who are no longer mentally ill, particularly in a situation in which the state has not proven, by clear and convincing evidence, that the individual poses a danger to the community. *Foucha* does not address the burden of proof that would apply at future release hearings, after the state had already established beyond a reasonable doubt that the individual is mentally ill and poses a danger, and thus does not support Taylor's due process challenge to section 6608's provision that places the burden on him to prove by a preponderance of the evidence that he is entitled to release because he no longer meets the SVP criteria.

In *Jones*, *supra*, 463 U.S. at pages 357, 366-368, the insanity acquittee bore the burden of proving, by a preponderance of the evidence, that he was no longer mentally ill or dangerous. The *Jones* court observed, "The statute provides several ways of obtaining release. Within 50 days of commitment the acquittee is entitled to a judicial hearing to determine his eligibility for release, at which he has the burden of proving by a preponderance of the evidence that he is no longer mentally ill or dangerous. [Citation]. If he fails to meet this burden at the 50-day hearing, the committed acquittee

subsequently may be released, with court approval, upon certification of his recovery by the hospital chief of service. [Citation.] Alternatively, the acquittee is entitled to a judicial hearing every six months at which he may establish by a preponderance of the evidence that he is entitled to release." (*Jones*, *supra*, 463 U.S. at pp. 356-357, fn. omitted.) The *Jones* court thus implicitly approved a review procedure similar to the one at issue here.

The initial commitment hearing under the Act provides a significant level of due process protection by requiring a finding beyond a reasonable doubt that the individual meets the SVP criteria. The required periodic reviews of a committed individual's mental health status and the procedures that permit these individuals to petition for release minimize the risk of an erroneous deprivation of liberty. Accordingly, we conclude there was no due process violation.

III.

Taylor contends the SVPA violates state and federal guarantees of equal protection because defendants are treated differently from those offenders civilly committed under other statutes like the Lanterman-Petris-Short (LPS) Act (section 5300 et seq.) relating to confinement for imminently dangerous persons; the mentally disordered offender (MDO) statute (Pen. Code, § 2960, et seq.) and the scheme for those found not guilty by reason of insanity (NGI) (Pen. Code, § 1026, et seq.).

This court summarized Proposition 83's changes to the Act in *People v. Shields* (2007) 155 Cal.App.4th 559 (*Shields*.) We explained that under Proposition 83, "former section 6604 was amended to eliminate the two-year term provision and to provide for an

indeterminate term of confinement (subject to the SVP's right to petition for release)." (*Shields*, at p. 562 .) Section 6604 of the Act now provides in relevant part: "If the court or jury determines that the person is a sexually violent predator, the person shall be committed for an *indeterminate* term to the custody of the [DMH] for appropriate treatment and confinement. . . ." (Italics added.) Proposition 83 did not change section 6604's requirement that a person's commitment as an SVP be proved at trial beyond a reasonable doubt. (§ 6604.)

"The statements of intent contained in Proposition 83 confirm the obvious intent of the Legislature in amending section 6604. The Proposition expressly sets forth the intent to strengthen SVP confinement laws: ' "[E]xisting laws that provide for the commitment and control of sexually violent predators must be strengthened and improved. [¶] . . . [¶] It is the intent of the People of the State of California in enacting this measure to strengthen and improve the laws that punish and control sexual offenders." ' [Citation.] More specifically, Proposition 83 states that the change from a two-year term to an indeterminate term is designed to eliminate automatic SVP trials every two years when there is nothing to suggest a change in the person's SVP condition to warrant release: ' "The People find and declare each of the following: [¶] . . . [¶] (k) California is the only state, of the number of states that have enacted laws allowing involuntary civil commitments for persons identified as sexually violent predators, which does not provide for indeterminate commitments. California automatically allows for a jury trial every two years irrespective of whether there is any evidence to suggest or prove that the committed person is no longer a sexually violent predator. As such, this

act allows California to protect the civil rights of those persons committed as a sexually violent predator while at the same time protect society and the system from unnecessary or frivolous jury trial actions where there is no competent evidence to suggest a change in the committed person." ' " (*Shields, supra,* 155 Cal. App.4th at p. 564, quoting Historical and Statutory Notes, 47A West's Ann. Pen. Code (2007 supp.) foll. § 209, p. 430 [now Historical and Statutory Notes, 47C West's Ann. Pen. Code (2008 ed.) foll. § 209, p. 52] & Prop. 83, §§ 2(h), 2(k), 31.)

"The initial inquiry in any equal protection analysis is whether persons are 'similarly situated for purposes of the law challenged.' " (*In re Lemanuel C.* (2007) 41 Cal.4th 33, 47; *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253 (*Cooley*).) The question is whether the state has adopted a classification that affects similarly situated groups in an unequal manner. (*Cooley*, at p. 253.) "A statute does not violate equal protection when it recognizes real distinctions that are pertinent to the law's legitimate aims." (*In re Marriage Cases* (2008) 43 Cal.4th 757, 873.) Indeed, California " 'may adopt more than one procedure for isolating, treating, and restraining dangerous persons; and differences will be upheld if justified. [Citations.] Variation of the length and conditions of confinement, depending on degrees of danger reasonably perceived as to special classes of persons, is a valid exercise of [state] power.' " (*People v. Hubbart* (2001) 88 Cal.App.4th 1202, 1217, quoting *Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 172.) "Strict scrutiny is the appropriate standard against which to measure claims of disparate treatment in civil commitment." (*People v. Green* (2000) 79 Cal.App.4th 921, 924.) Under this standard, the state has the burden of establishing it has

a compelling interest that justifies the law and that the distinctions, or disparate treatment, made by that law are necessary to further its purpose. (*Warden v. State Bar* (1999) 21 Cal.4th 628, 641; see also *People v. Buffington* (1999) 74 Cal.App.4th 1149, 1156.)

In our view, SVPs are not similarly situated to those committed under the MDO, LPS and NGI schemes for the purposes of an equal protection analysis. There are notable differences among those schemes regarding their purposes, the degree and type of danger posed by individuals committed under them, and the severity of the individuals' mental illnesses and their prognosis. For example, those involuntarily committed under the LPS include individuals who have not committed any crime. (§ 5300.5, subd. (b).)

To a significant degree, SVPs are civilly committed because of the likelihood they will engage in future sexually violent criminal acts. (See Ballot Pamp., Gen. Elec. (Nov. 7, 2006) text of Proposition 83, p. 127 ["Sex offenders have very high recidivism rates. According to a 1998 report by the U.S. Department of Justice, sex offenders are the least likely to be cured and the most likely to reoffend. . . . ") Therefore, SVPs pose a substantial danger to the community. By contrast, the other classification groups may include individuals whose mental illnesses are of shorter duration, less recurrent, and more amenable to successful treatment. (See, e.g., *People v. Buffington*, *supra*, at p. 1163 [determining that SVPs and MDOs are not similarly situated for purposes of equal protection based on differential treatment requirements].)

Even if we assume that SVPs, MDOs, NGIs and LPSs are similarly situated for the purpose of the asserted equal protection claim, we conclude California has shown a compelling interest in imposing an indeterminate commitment term for SVPs. Before the

Proposition 83 amendments, the California Supreme Court observed that the SVP law "narrowly targets 'a small but extremely dangerous group' of sexually violent predators that have diagnosable mental disorders [who] can be identified while they are incarcerated." (*Cooley*, *supra*, 29 Cal.4th at p. 253.) "The problem targeted by the Act is acute, and the state interests — protection of the public and mental health treatment — are compelling." (*Hubbart v. Superior Court*, *supra*, at p. 1153, fn. 20.) When voters passed Proposition 83, they had before them the facts that sex offenders "prey on the most innocent members of our society"; that such offenders "have very high recidivism rates" and are the "least likely to be cured and the most likely to reoffend." (Historical and Statutory Notes, 47C West's Ann. Pen. Code (2008 ed.) foll. Pen. Code § 209, p. 52; see Ballot Pamp., Gen. Elec. (Nov. 7, 2006) text of Prop. 83, p. 127.)

We do not agree with Taylor that the circumstances in *Baxtrom v. Herold* (1966) 383 U.S. 107 are apposite. In *Baxtrom*, the court found an equal protection violation when the state deprived a prisoner of a jury trial and finding of dangerousness when it sought to civilly commit him at the end of his prison term, in view of the fact these protections were available to other civilly-committed persons. (*Baxtrom*, 383 U.S. at p. 111; see *In re Smith* (2008) 42 Cal.4th 1251, 1264.) The SVPA, however, does not deprive persons subject to an initial commitment petition of a jury trial or finding of present inability to control sexually violent behavior. (§ 6604.) Further, under the SVPA, an SVP committed to an indeterminate term has the opportunity for meaningful judicial review via annual petitions for release, provided they are not frivolous and are supported by sufficient factual allegations. (§§ 6605, 6608.)

We conclude the characteristics of dangerousness and amenability to treatment recognized by the Proposition 83 voters justify any disparate treatment of SVPs from those civilly committed under the MDO, LPS and NGI schemes. The voters intended to enhance the confinement of SVPs, eliminating automatic SVP trials every two years when there is nothing to suggest a change in the person's condition to warrant release. (*Shields*, *supra*, 155 Cal.App.4th at pp. 563-564.) These voters reasonably concluded based on the above-referenced considerations that SVPs should be committed to indeterminate terms, subject to hearings on petitions for release at which they may bear the burden to prove by a preponderance of the evidence that they are no longer SVPs. Because imposition of an indeterminate term for SVPs under the amended Act has been shown necessary to further compelling state interests, the amended Act does not violate state and federal constitutional rights to equal protection under the law.

IV.

Taylor also argues the changes made to the SVPA convert the statute from one concerned about commitment for treatment to one concerned about punishment, in violation of the ex post facto and double jeopardy laws.

Article I, section 10, of the United States Constitution provides: "No State shall . . . pass any . . . ex post facto Law. . . ." The constitutional ban on ex post facto legislation "prohibits only those laws which 'retroactively alter the definition of crimes or increase the punishment for criminal acts.' " (*Hubbart v. Superior Court*, *supra*, 19 Cal.4th 1138, at pp. 1170-1171, italics omitted, quoting *Collins v. Youngblood* (1990) 497 U.S. 37, 41-44 (*Collins*).)

In *People v. Bright* (1996) 12 Cal.4th 652, 660 (*Bright*), overruled on other grounds in *People v. Seel* (2004) 34 Cal.4th 535, 550, footnote 6, the California Supreme Court explained that, "[t]he double jeopardy clauses of the Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, and article I, section 15, of the California Constitution, guarantee that a person shall not be placed twice 'in jeopardy' for the 'same offense.' The double jeopardy bar protects against a second prosecution for the same offense following an acquittal or conviction, and also *protects against multiple punishment for the same offense*." (*Bright*, at p. 660, Emphasis added.) A subsequent appellate court case (*People v. Carlin* (2007) 150 Cal.App.4th 322, 348) rejected a double jeopardy challenge to the SVPA based on *Hubbart v. Superior Court*. We find nothing in the amendments of the SVPA contained in Senate Bill 1128 and Proposition 83 to alter the conclusion reached in *Hubbart v. Superior Court* and *Carlin*.

As the court pointed out in *Hubbart v. Superior Court*, the legislative characterizations of a law play a critical role in determining whether or not a law inflicts punishment within the meaning of *Collins*, *supra*, 497 U.S. at page 43. (*Hubbart v. Superior Court*, *supra*, 19 Cal.4th 1138, at p. 1171.) The court noted, among other things, that the SVPA legislative scheme makes clear that persons eligible for commitment as SVPs "are to be viewed 'not as criminals, but as sick persons' " pursuant to section 6250. (*Hubbart v. Superior Court*, at p. 1171.) Furthermore, "[c]onsistent with these remarks, the SVPA was placed in the Welfare and Institutions Code, surrounded on each side by other schemes concerned with the care and treatment of

various mentally ill and disabled groups." (*Ibid*.) The court also relied on the ex post facto analysis in *Hendricks, supra,* 521 U.S. at pages 361-368, which found the Kansas Act did not inflict punishment within the meaning of the ex post facto clause. (*Hubbart v. Superior Court, supra,* at pp. 1171-1175 .) Also, as we have already noted, the Legislature in 1996 intended that SVPs "be committed and treated for their disorders only as long as the disorders persist and not for any punitive purposes" (Stats.1995, ch. 763, § 1). Nothing in the statute's amendments indicates an alteration of this intent. We conclude that defendant's ex post facto and double jeopardy rights were not violated by the amended SVPA.

DISPOSITION

The order is affirmed.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.